IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Marriage of:	)	NO. 62612-4-I
	)	
LAURA L. HAMILTON,	)	
	)	
Appellant,	)	
	)	
and	)	UNPUBLISHED OPINION
	)	
David D. Hamilton,)		
	)	
Respondent.	)	FILED: July 27, 2009

BECKER, J. – The parties to this appeal, formerly a married couple, agreed upon separation to submit to arbitration any dispute between them concerning a sale of their jointly owned business. When a dispute arose concerning whether the agreement contemplated the possibility of a sale to one of the owners rather than to a third party, resolving this dispute and permitting one party to purchase the business was within the powers conferred upon the arbitrator by their agreement. The trial court did not err by confirming the award.

The parties to this appeal are David Hamilton and Laura Crandall, formerly Hamilton. They married in 1988. During their marriage they formed and operated a business known as Delivery Express, Inc. (DelEx). When they separated in 2002, they entered into a comprehensive agreement under Civil Rule (CR) 2A with the assistance of Douglas Becker acting as mediator. Under paragraph 5 of the agreement, DelEx was to be placed on the market for sale. In the meantime, David would operate the business. A potential sale had to be approved by both David and Laura, but approval was not to be unreasonably withheld. Any disputes "related to sale of the business" would be subject to binding arbitration with Mr. Becker.

Several years passed and the company remained unsold. David obtained an appraisal valuing the business at $1,425,000 for a 100 percent equity interest. The appraiser also estimated the value of a hypothetical covenant not to compete related to the sale of DelEx by David.

On July 22, 2005, David made a time-limited offer to buy Laura out for $698,250. He stated that if she did not accept, he would ask Mr. Becker to order the sale of the business to him, and at a figure that would provide substantially less to Laura. Laura declined his offer and made a counteroffer. Further, she took the position that the arbitrator could not force a sale to anyone other than a third party: "An option to purchase the other party's shares in the business

cannot be found anywhere in the parties' settlement agreements. Thus, it does not appear to us that, in these circumstances, Mr. Becker has the authority to require Ms. Hamilton to sell her shares to Mr. Hamilton."

David did not accept Laura's counteroffer. They agreed that Mr. Becker should decide whether he had the authority to arbitrate a dispute concerning an offer by one of them to purchase the business. On April 11, 2007, Mr. Becker ruled that he did have such authority:

> 2. The arbitrator finds Section 5 does not prohibit one or both parties from making an offer to purchase the business and there is no reasonable basis to imply such a prohibition. A sale of the business to an outsider and a sale of the business to one of the parties are subject to the same conditions. Either party may make an offer to purchase the business.
>
> 3. The arbitrator finds a dispute now exists as to the husband's offer to purchase the business and possibly the wife's offer to do the same and the dispute is subject to arbitration.

An arbitration was ultimately scheduled for July 29, 2008. Laura's attorney wrote to the arbitrator stating that Laura would not be appearing and that her letter should be considered a cancellation of the hearing. Mr. Becker advised the parties that the hearing would proceed:

> The issue of my authority to arbitrate was settled by the arbitration decision of April 11, 2007. The source of my authority to arbitrate was provided in Paragraph 5 of the parties' Separation Contract. It is a broad grant of authority.
>
> It is not within your authority to cancel the arbitration. That would require mutual agreement.
>
> Ms. Crandall has had abundant notice of this hearing. The arbitration will proceed Tuesday, July 29, 2008 at my office at 3:00

p.m. You may present your arguments at that time.

David appeared for the arbitration and Laura did not. On August 1, 2008, Mr. Becker made his award in favor of David, finding that Laura had unreasonably refused David's offer. Laura was ordered to sign over her shares to David.

Laura moved to vacate the award as exceeding the arbitrator's powers. The court denied Laura's motion and confirmed the award. Laura appeals. She maintains that the agreement of the parties did not allow the arbitrator to decide that one party had to sell the business to the other.

Washington courts give substantial finality to a decision by an arbitration panel rendered in accordance with the parties' contract and RCW 7.04A. The shorthand description for this policy of finality is that judicial review of an arbitration award is limited to the face of the award. In the absence of error of law on the face of the award, the arbitrator's award will not be vacated or modified. Davidson v. Hensen, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). Judicial review of an arbitration award, therefore, does not include a review of the merits of the case. Ordinarily, the evidence before the arbitrator will not be considered by the court. Davidson, 135 Wn.2d at 119.

One of the statutory grounds for vacating an award exists when the arbitrators have exceeded their powers. RCW 7.04A.230(1)(d). The error, if

any, should be recognizable from the language of the award. Federated Servs. Ins. Co. v. Norberg, 101 Wn. App. 119, 124, 4 P.3d 844 (2000). An example of an error recognizable on the face of the award is found in Kennewick Educ. Ass'n v. Kennewick School Dist. 17, 35 Wn. App. 280, 282, 666 P.2d 928 (1983), where the arbitrator identified a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages.

The error Laura alleges is that the agreement necessarily prohibits an arbitrator from forcing a sale to one of the parties. She reasons that the requirement of placing DelEx on the market for sale and requiring that it be actively marketed would have been unnecessary if a sale to one of the existing parties was within the terms of the agreement. According to Laura, to interpret the contract as allowing any type of sale not explicitly prohibited is an impermissibly expansive reading of the contract. For this proposition, she relies on Anderson v. Farmers, Inc. Co. of Washington, 83 Wn. App. 725, 730, 923 P.2d 713 (1996) ("An arbitrator's powers are governed by the agreement to arbitrate. … The ensuing award must not exceed the authority established in the agreement.").

Nothing on the face of the arbitration award in this case runs afoul of the black letter law stated in Anderson. Laura and David agreed to give Mr. Becker broad power to resolve disputes related to sale of the business—"Any disputes

between the parties herein related to sale of the business or any consequences thereof shall be subject to binding arbitration with Douglas P. Becker." The dispute Mr. Becker resolved was within his powers because it was a dispute between the parties and it related to sale of their business.

When a party claims that it is evident on the face of the award that the arbitrator exceeded the power conferred upon him by an agreement, it is not appropriate for the court to scrutinize the agreement to determine the intention of the parties who made the agreement. Boyd v. Davis, 127 Wn.2d 256, 261-63, 897 P.2d 1239 (1995). In Boyd, the court held it was improper for the trial court, in determining whether the arbitrator exceeded the scope of his power, to examine the four corners of the contract to discern the intent of the parties.

> Arbitration's desirable qualities would be heavily diluted, if not expunged, if a trial court reviewing an arbitration award were permitted to conduct a trial de novo. Accordingly, that court cannot search the four corners of the contract to discern the parties' intent, as did the trial court in this case.

Boyd, 127 Wn.2d at 263.

In effect, Laura asks this court to do what Boyd says may not be done: to interpret the meaning of a contractual provision that arguably could be read in more than one way. The parties agreed that an arbitrator, not a court, would be empowered to resolve any such dispute "related to sale of the business." Their agreement does not explicitly prohibit one or both parties from making an offer to

purchase the business nor does it explicitly prohibit the arbitrator from adjudicating a dispute over such an offer and forcing the sale. We conclude the arbitrator did not exceed his authority by forcing Laura to sell to David.

Laura contends the arbitrator also exceeded his authority when, in calculating the value of the business, he made a deduction in David's favor based upon the hypothetical covenant not to compete.

The award contains the arbitrator's finding that David's offer to buy Laura out was reasonable. He agreed with David's position that the value of a covenant not to compete would be David's separate property and cited two cases supporting that position. He credited David's testimony that without such a covenant, the market value of the company in a sale would be reduced because of the possibility of competition from David. Laura argues that the court decisions cited by the arbitrator are distinguishable and that by relying on them the arbitrator committed an error of law subject to judicial review.

The arbitrator is the judge of the law as well as the facts unless error appears on the face of the award. The arbitrator did not misstate the law by citing two cases in which the valuation of a covenant not to compete is addressed. The application of these cases to the particular facts of the case was part of the arbitrator's legitimate function with which a court will not interfere. Mr. Becker had to decide whether it was reasonable to force Laura to sell to

David, and on what terms. A different arbitrator might have used a different methodology, might have gone through different thought processes, and might have cited different cases or none at all. The question before this court is not whether some other approach might have been preferable but whether the award produced by Mr. Becker showed on its face that it was legally erroneous. Laura has failed to identify any such error of law in the award's reference to the hypothetical covenant not to compete.

The parties' agreement contains a provision for attorney fees to the prevailing party:

> If either party defaults in the performance of any of the terms, provisions or obligations of this agreement, and it becomes necessary to institute legal proceedings to effectuate the performance of any such terms, provisions or obligations, then the party found to be in default shall pay all expenses, including reasonable attorney fees, incurred in connection with such enforcement proceedings.

As the prevailing party in this appeal, David is entitled to an award of attorney fees, subject to compliance with RAP 18.1.

Affirmed.

Becker, J.

WE CONCUR:

Ajid, J.

Grosse, J